

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALICE BRADFORD)	
Claimant)	
)	
VS.)	
)	Docket No. 256,803
PIONEER BALLOON COMPANY)	
Respondent)	
AND)	
)	
WAUSAU UNDERWRITERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals Administrative Law Judge Jon L. Frobish's February 23, 2001, preliminary hearing Order.

ISSUES

In an earlier November 2, 2000, preliminary hearing Order, the Administrative Law Judge (ALJ) granted claimant's request for temporary total disability compensation and medical treatment through orthopedic surgeon Robert L. Eyster, M.D. Respondent timely appealed that preliminary hearing Order to the Appeals Board (Board). In an Order dated December 28, 2000, the Board affirmed the ALJ's November 2, 2000, preliminary hearing Order .

The February 23, 2001, preliminary hearing Order is the result of respondent filing an Application for Preliminary Hearing requesting the ALJ to reverse the November 2, 2000, preliminary hearing Order. Respondent contends that claimant's need for medical treatment and the reason claimant is temporarily and totally disabled is not related to her work activities but, instead, is caused by her preexisting degenerative arthritic spinal disease process unrelated to her employment.

In the ALJ's February 23, 2001, preliminary hearing Order, that is the subject of this appeal, the ALJ did not reverse his previous finding that the claim was compensable, but reserved the issues of payment of temporary total disability compensation and payment of medical expenses until the final award.

On appeal, the claimant contends that the ALJ cannot, at this stage of the proceedings, reserve making a decision on payment of temporary total disability compensation or payment of medical bills until the final award.

Conversely, respondent contends the November 16, 2000, independent medical report of Dr. C. Reiff Brown established that claimant's work activities at the most only temporarily aggravated claimant's preexisting degenerative low back condition and did not result in any permanent injury requiring surgical intervention.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Board makes the following findings and conclusions:

The Board finds it is not necessary to repeat in this Order all of the findings and conclusions previously set forth in its December 28, 2000, Order that affirmed the ALJ's November 2, 2000, preliminary hearing Order. Thus, the Board adopts those findings and conclusions as if specifically set forth in this Order.

The Board, in its December 28, 2000, Order, concluded that claimant's testimony, coupled with the medical opinions of treating physicians Drs. Varner, McCormac, Eyster and court appointed independent medical examiner, Dr. Brown, were persuasive and convincing that claimant's preexisting degenerative low back condition was permanently aggravated and made worse because of claimant's work activities while she was employed by the respondent.

The main controversy that has now arisen in this case centers around the correct description of the job duties claimant performed on the pulling balloon job that claimant alleges made her preexisting degenerative low back condition symptomatic to the point she could no longer work. Respondent argues that the job duties claimant related to Dr. Brown, during his independent medical examination of claimant, exaggerated the physical demands of the job. Thus, respondent argues that Dr. Brown's original opinion that claimant's work duties have permanently aggravated claimant's preexisting degenerative back condition that required surgery was severely flawed.

After the November 2, 2000, preliminary hearing Order was entered, the respondent had Dr. Brown view a videotape of a woman performing the pulling balloon job. Respondent contends the videotape is a fair representation of the job duties that claimant performed. After Dr. Brown viewed the videotape, in a November 16, 2000, report, he concluded, "I cannot say with reasonable medical certainty that this work activity could cause sufficient weight and stress to be transmitted to the spine to cause permanent aggravation of a pre-existing degenerative condition such that surgery would be required." Dr. Brown also reviewed claimant's description of the pulling balloon job duties contained in her August 29, 2000, preliminary hearing testimony. The doctor concluded that the duties as described by the claimant would cause symptoms that would subside in a few days with "no significant permanent aggravation of symptoms."

Before the February 23, 2001, the preliminary hearing Order was entered, the claimant, pursuant to the previous preliminary hearing Order, underwent surgery performed by authorized orthopedic surgeon Dr. Robert L. Eyster. On December 11, 2000, Dr. Eyster performed a decompression at L4-S1 with internal fixation pedicle screws with rods and a L4-S1 fusion. Admitted into evidence at the February 20, 2001, preliminary hearing, was a statement signed by Dr. Eyster indicating that claimant would probably be totally disabled for six months from a December 26, 2000, examination.

At the February 20, 2001, preliminary hearing, claimant testified the videotape did not accurately represent the job duties she performed as a balloon puller. First, the machine claimant operated was not the same machine the woman was operating in the videotape. Thus, claimant testified different types of balloons were run on claimant's machine which were harder to take off the conveyor belt and required claimant to bend forward more than what the woman was bending in the videotape. Second, the woman performing the job in the videotape was 5'6" or 5'7" while claimant only stands 5 foot. This height differential requires claimant to bend forward more than the woman performing the job in the videotape. Additionally, after the boxes are filled with balloons, then the worker has to reach around and twist to get another box. The woman in the videotape did not perform the job task of twisting around and getting another box after the box was filled with balloons.

Both claimant and respondent discuss in their briefs the fact that the ALJ, in deciding to reserve payment of temporary total disability and medical expenses, must have found, based on Dr. Brown's November 16, 2000, report, that claimant's work activities only resulted in claimant suffering a temporary exacerbation of her preexisting low back condition and not a permanent aggravation. The respondent argues, since this was a temporary aggravation and not a permanent injury, claimant's need for surgery was related to her degenerative low back condition and not her work activities. In contrast, the claimant argues, even if the preexisting low back condition was temporarily exacerbated, claimant's need for surgery was the result of the work activities and respondent should be ordered to continue to pay temporary total disability benefits and medical expenses.

The Board has previously held that the preliminary hearing statute requires the ALJ to make an initial determination of the issues pertaining to compensability and entitlement to benefits. To find otherwise, would thwart the intent and purpose of the Workers Compensation Act to provide a means for prompt, initial determination of those issues.¹ The Board finds that the practical effect of the ALJ's February 23, 2001, preliminary hearing Order denied claimant temporary total disability compensation and payment of medical expenses that were the result of the surgical intervention completed under the authority of a previous valid preliminary hearing Order. The Board concludes, as the ALJ

¹ See Hawk v. Rubbermaid, Inc., WCAB Docket No. 180,303 (March 1994).

had to find, that claimant has proven that her work activities, at the very least temporarily aggravated her preexisting degenerative low back condition requiring surgical intervention. That surgical intervention is now the primary reason claimant is temporarily and totally disabled and is in need of continued medical treatment including payment of previously authorized medical expenses associated with the authorized surgery. Therefore, the Board concludes that the ALJ's decision now, after the fact, to discontinue temporary total disability compensation payment to the claimant and to discontinue payment of medical benefits until final award, is inappropriate and should be reversed. At this juncture of the proceeding, claimant cannot be left without support or medical treatment as a result of a previous preliminary hearing Order that authorized surgery and therefore the need for temporary total disability compensation and followup medical treatment. After a full hearing on the claim, if the compensation awarded is disallowed, respondent can seek reimbursement from the Workers Compensation Fund for all such disallowed compensation.²

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Jon L. Frobish's February 23, 2001, preliminary hearing Order, should be affirmed as it relates to the issue of compensability, but is reversed as it relates to the issues of payment of temporary total disability benefits and medical expenses. The preliminary hearing Order, therefore, is modified to order the respondent to continue paying temporary total disability compensation until claimant is released to substantial gainful employment by Dr. Eyster and to pay all medical expenses associated with Dr. Eyster's surgery and all continuing followup medical treatment or referrals.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

c: Jan L. Fisher, Topeka, Ks.
Christopher J. McCurdy, Wichita, Ks.
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

² See K.S.A. 44-534a(b)